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OUR FILE MI051-002

To: Montana Senate Committee

From: Richard Martin, Fair Claim Law Firm

Re: S.B.288

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When any Montanan is injured **while employed** due to some person's fault other than his immediate employer or co-employee, the injured person has a right of "full legal redress" which is specifically stated in Article II, Section 16 of the Montana Constitution:

“... No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable ...”

Full Legal Redress means that the injured worker has a right to be compensated from the person at fault for all damages which flow from the injury which can include: medical expenses, lost wages, loss of fringe benefits, pain and suffering, loss of earning capacity, loss of enjoyment of life, loss of consortium of the spouse, loss of household services. This right to full legal redress cannot be taken away by the legislature .

“Section 39-71-414(6)(a) MCA, restricts an injured worker’s right to obtain full legal redress against third-party tortfeasors. The second sentence of Article II, Section 16 states this cannot be done. . . . The second sentence is mandatory, prohibitive, and self executing and it prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third parties. . . We hold Sec 39-71-414(6)(a), MCA is unconstitutional in light of the clear and direct language of Article II Section 16 of the Montana Constitution”. *Francetich v. State Comp. Fund* (1992).

(Note: *Francetich* was a unanimous decision of the Montana Supreme Court which included Chief Justice Turnage, and Justices Harrison, Gray, Trieweiler, McDonough, Weber and Hunt)

The state of the law in Montana on subrogation by an insurer of an injured worker's equitable right to be made whole and Constitutional right of full legal redress has been clearly established, through decades of litigation.

Skauge v. Mountain States Telephone v Mont Dakota Utilities 172 Mont 521 (1977)
Zacher v. American Insurance Company 243 Mont 226 (1990)
Francetich v. State Comp Fund 252 Mont 215 (1992)
Ness v. Anaconda Minerals 279 Mont 472 (1996)
State Comp Ins. Fund v. McMillan 306 Mont 155 (2001)

S.B. 288 is based on a flawed legal analysis that the legislature can circumvent Article II Sec. 16 of the Montana Constitution which guarantees full legal redress for all injuries to workers, citing *Zacher* and *McMillan*. The *Zacher* and *McMillan* cases base their decisions on the principle of Equitable Subrogation, but those cases do not conclude that there is not an additional basis in the Constitution. The *Zacher* and *McMillan* decisions merely state that, just considering equitable principles alone, the equities are clearly with the injured worker.

"... the basic conclusion is that when the amount recovered by a claimant is less than the claimant's total loss, with a result that either the claimant or the insurer must to come extent go unpaid, then it is equitable that the loss be borne by the insurer which had been paid an insurance premium for the assumption of liability ... The key aspect is that the insurer has been paid for the assumption of liability for the claim and that where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant. " (emphasis added) *Zacher* 243 Mont at 231.

In *McMillan*, the Montana Supreme Court affirmed *Zacher* and explained that the made whole doctrine is based on the rule of Equitable Subrogation whereas the right of full legal redress is a Constitutional level analysis. Although "made whole" and "full legal redress" sound the same, they are not the same because each derives from different legal bases.

In both *Zacher* and *McMillan* the Court was able to resolve the issue of subrogation without having to apply a Constitutional analysis. Courts try to resolve issues at a level that does not require Constitutional jurisprudence. Those decisions did not say, however, that the right of full legal redress in Article II Sec 16 can be legislatively altered.

Several non-workers compensation cases have been cited as supporting the right of the legislature to encroach on the "made whole doctrine of equitable subrogation". *Swanson v. Hartford Ins Co.* 309 Mont 269 (2002); *Conway v. Benefis Health Systems, Inc* 369 Mont 309, 297 P3d 1200 (2013); *Diaz v. State of Montana* 2013 MT 331. However, **these cases do not involve an injured employee** and so the special Constitutional right of full legal redress for injured employees in Article II Sec 16 were not at issue.

The injured worker gets some workers compensation payments for medical expenses, but only if the expenses are incurred within 5 years of the injury and only if they comply with the Utilization and Treatment Guidelines. Thus, the worker is not fully compensated for medical expenses by workers compensation.

The injured worker gets some workers compensation benefits for lost wages, but only 2/3 of the average weekly wage at the time of the injury, only until maximum medical healing, and some future lost wages but only for about 2 years if PPD, or only until retirement age if PTD. Thus the worker is not fully compensated for wage loss by workers compensation.

The injured worker get no workers compensation for the remainder of the medical expenses, the remainder of the wage loss, for any loss of fringe benefits, for any of the loss of earning capacity, for any of the loss of enjoyment of life, for any of the loss of consortium , for any of the loss of household services.

Conventional wisdom is that workers compensation benefits compensate a worker for only 10% of total damages, leaving the worker 90% short of full legal redress.

Rarely, is there a viable "third party" case in a worker's compensation claim. The "third party" claims are vigorously defended, require lengthy litigation and are tough cases to pursue.

There is great pressure on litigants to settle cases out of court, which can only happen if the litigants significantly compromise their claims. Thus, an injured worker almost never is fully compensated for damages in a third party action, agreeing to take less than full damages to avoid the costs and risks and delays of trials and appeals or because of finite policy limits of the third party. Out of a settlement or judgment, the worker has to pay the handling attorney a contingency fee, plus the thousands of dollars of costs.

When a third party case gets settled, or when a jury verdict is returned, there is no way to determine how and why the third party or the jury arrived at the settlement amount. The amount may or may not include payment for some medical expenses. Often third party defendants dispute the reasonableness and necessity of medical expenses incurred. Often the third party demands a reduction of the settlement demanded by the injured worker for the medical expenses and wage loss benefits already paid by the workers compensation insurer, and only compensates the injured worker for the damages which are above and beyond what the workers compensation insurer paid. The thought processes of both the third party insurer and the jury are unascertainable and confidential. It cannot be assumed that every medical expense incurred by the injured worker is fully accepted and fully paid / awarded by the third party insurer or jury. Thus it cannot be assumed that there is double recovery for any element of damage.

One of the bases that the proponents make for changing the law pertains to the Mod Factor assigned to employers as a result of workers compensation claims. Employers argue that their ModFactor should not be affected by claims which occur as a result of a third party's fault, and that if subrogation were allowed, then the negative effect on their Mod Factor would be diminished. The simple solution to that situation is to not allow a ModFactor effect in cases where a third party is at fault.

In conclusion, the present state of the law on subrogation in workers compensation cases in Montana should not be modified because:

1. It's the law. The people of Montana have clearly written it into the Constitution. Any attempt to change will not withstand judicial check and balance on the power of the legislature, and will foster unnecessary expensive and acrimonious litigation. The Montana Supreme Court has addressed this issue consistently for almost 30 years and has always upheld the worker's right to be made whole and to obtain full legal redress.

2. It's equitable. Fairness demands that the injured worker be favored in pursuing full legal redress, not an insurer which has collected an insurance premium and voluntarily accepted the risk. If there is a ModFactor problem then fix it, without diminishing the worker's right of full legal redress.

3. It's not a problem. There are so few workers compensation cases with a viable third party recovery that it's not significant in relation to the volume of workers compensation business in Montana.

4. There is no double recovery. It's impossible to determine which damages are being compensated in a third party settlement or jury verdict.